CLERK'S COPY.

CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 120

EPHRAIM LEDERER, FORMERLY COLLECTOR OF INTERNAL REVENUE

vs.

MARY A. McGARVEY, EXECUTRIX OF THE ESTATE OF FRANCIS O'KANE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED JULY 1, 1924

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1 In United States Circuit Court of Appeals for the Third Circuit

October term, 1923

EPHRAIM LEDERER, FORMERLY COLLECTOR OF INTERNAL revenue, defendant below, plaintiff in error
vs.
MARY A. McGARVEY, EXECUTRIX OF THE ESTATE OF FRANCIS O' KANE, plaintiff below, defendant in error
No. 3093

In error to the District Court of the United States for the Eastern District of Pennsylvania

Before WOOLLEY and DAVIS, Circuit Judges, and GIBSON, District Judge

Statement of facts

Certificate to the Supreme Court—filed June 25, 1924

In order to be guided to a proper decision of this case the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and therefore, under authority of section 239 of the Judicial Code, certifies two questions of law arising from the following facts:

Section 6 of the act of Congress of October 28, 1919, 41 Stat. 305, generally known as the national prohibition act, provides that—

2 No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, * * *.

"The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title."

Under this provision of the statute, the Bureau of Internal Revenue of the Treasury Department, acting through the Federal prohibition commissioner with the approval of the Secretary of the Treasury, given January 16, 1902, promulgated Regulations 60 relative to the sale and purchase of intoxicating liquor under Title II of the act. Section 20 of the regulations reads as follows:

"All persons desiring to obtain permits provided by these regulations, except as provided below, must at or before the time of filing application therefor, file with the director a bond in duplicate on Form 1408 or Form 1409 to insure compliance with the provisions of this act and of these regulations as well as to cover any taxes and penalties which may be imposed under the internal revenue laws. * * *

"(a) Except where otherwise provided, the basis of the penal sum of such bond will be as follows:

"$4.20 per proof gallon on distilled spirits and $100 for each 200 gallons, or fractional part thereof, on wine, malt liquor, cider, or other liquor, manufactured or received during any quarterly period of the calendar year plus the quantity on hand at the end of the preceding quarterly period. In no case shall the penal sum of any bond be less than $1,000 nor more than $100,000.

"(b) * * *

"(c) Where holders of permits to use or sell nonbeverage spirits or wines have given bond as provided in Treasury Decision 2940 and Treasury Decision 2946, and such bonds are in sufficient penal sum, no new bonds need be furnished until such persons are called upon by the directors to make applications for new permits, as provided in section 17, when they will be required to file new bonds on Form 1408 or Form 1409."

Conformably with the cited regulations, Francis O'Kane on February 17, 1920, applied for a permit "to sell distilled spirits and wines for other than beverage purposes," and filed with his application a bond, executed February 7, 1920, for $2,000, following Form 738. The bond reads as follows:

"Know all men by these presents, that Francis O'Kane, of Philadelphia, Pennsylvania, as principal, and Maryland Casualty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of two thousand dollars, lawful money of the United States, for payment whereof to the United States we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally, firmly by these presents.

3 "Whereas the above-bounden principal has made application for a permit to use and sell distilled spirits and wines for other than beverage purposes at 701 So. 15th Street, Philadelphia, Pennsylvania.

"Now, therefore, the condition of this obligation is such that if the said principal shall fully and faithfully comply with the requirements of the laws of the United States now or hereafter enacted and regulations issued pursuant thereto, respecting the sale or use of distilled spirits and wines for other than beverage purposes, then this obligation to be void; otherwise to remain in full force and virtue."

Bond Form 738, under which the aforegoing bond was drawn, was originally prescribed in connection with the enforcement of the provisions of sections 15 and 16 of the food control act of 1917, promulgated as a part of Treasury Decision 2559, approved October 26, 1917.

Treasury Decision 2559 provides as follows:

"Any violations of these regulations will subject the offender to the penalty provided by the statute, to wit, a fine not exceeding $5,000, or imprisonment for not more than two years, or both, and to the

pains and penalties denounced by statute for violation of the internal revenue laws as well as to liability on his bond."

Treasury Decision 2788, approved February 6, 1919, provided an amended form of internal revenue bond (Form 739), which reads as follows:

"Any person who violates these regulations is subject to the penalties provided by the act of August 10, 1917, the act of November 21, 1918, and the revenue act of 1918, as well as to liability on his bond."

These sections of Treasury Decisions 2559 and 2788 were continued in force by Treasury Decision 2940.

On March 15, 1920, the prohibition commissioner issued to O'Kane a permit on Form 1405 by which he was "authorized and permitted to sell intoxicating liquors for other than beverage purposes, to wit: To others holding permits which confer authority to purchase and use intoxicating liquors for nonbeverage purposes. * * * This permit is granted under the conditions that the provisions of national prohibition act and regulations issued thereunder will be strictly observed."

With this permit in hand, O'Kane admittedly sold three barrels of whiskey to a pharmacy having no permit to purchase whiskey and, further, failed to keep Form 52 as provided by Regulations 60, in violation of the national prohibition act and the regulations thereof. Accordingly the Commissioner of Internal Revenue assessed against him taxes amounting to $1,140.39, of which $1,098.72 represent a differential tax at $8.40 per gallon (double the figure named in section 20 of the regulations) on 130.8 proof gallons, under the provisions of section 600 of the revenue act of 1918, approved February 24, 1919, and $41.67 represent penalties under section 3244 R. S. and section 3176 R. S., as amended. O'Kane paid these taxes under protest and filed a claim for refund. The commissioner rejected the claim in the amount of $41.67 but allowed it in the amount of $1,098.72, with interest, on an opinion by the Attorney General of the United States, rendered after the assessment of the taxes in question, to the effect that the national prohibition act allows permits of this kind only to manufacturers and distillers. O'Kane then brought this suit in the District Court against the Collector of Internal Revenue to recover both the sum rejected and the sum allowed on his claim for refund as taxes illegally assessed and collected. The collector filed an affidavit of defense in which he conceded the plaintiff's claim as previously allowed by the commissioner but opposed recovery by a counterclaim for $2,000 which he set up on the plaintiff's bond, alleging the beforementioned breaches of its condition, that the plaintiff, as principal, had violated the law by the sale of whiskey to one without a permit to purchase whiskey and had violated the regulations by not keeping Form 52 as thereby required. On motion the court issued a rule to show cause why judgment for the plaintiff should not be entered for want of a sufficient affidavit of defense. This proceeding, under

Pennsylvania practice, is in the nature of a demurrer. At the hearing the defendant collector took the position that the bond
5 which the plaintiff gave the United States, being conditioned, as before stated, to "comply with the requirements of the laws of the United States * * * and regulations issued pursuant thereto," is, upon violation of the law and regulations, forfeitable in the full amount of its penal sum—in the nature of a statutory penalty—and that recovery is not limited merely to the amount of the taxes due the United States by reason of such violation. The District Court was inclined to this contention, had the condition of the bond been directed only to faithful compliance with the laws of the United States, but, in view of the dual aspect of the condition, which, besides requiring compliance with the laws, extends as well to compliance with "regulations issued pursuant thereto," and in view of the fact that these regulations, as shown by section 20 thereof, call for a bond "to cover any taxes and penalties which may be imposed under the internal revenue laws," the court held, in line with the plaintiff's contention, that liability on the particular bond under consideration, read in connection with the regulations under which it was executed, is not to be measured by the penalty but is limited to the actual damages sustained and proved. As the commissioner found that certain of the taxes here sued for had been illegally assessed and collected and should be refunded, no damages were shown. Accordingly, the court made the rule absolute and entered judgment for the plaintiff for the amount of the differential tax, with interest. To this judgment the Collector of Internal Revenue, the defendant below, has directed this writ of error.

Questions certified

The questions of law upon which the Circuit Court of Appeals desires the instructions of the Supreme Court are these:

(1) Is a bond conditioned upon compliance with the laws of the United States and regulations issued pursuant thereto, respecting the sale or use of distilled spirits and wines for other than beverage purposes, given the United States by one to whom a permit to sell
6 intoxicating liquors for other than beverage purposes has been issued under the provisions of section 6 of Title II of the national prohibition act and regulations promulgated thereunder, forfeitable upon breach of the condition in the full amount of its penal sum?

(2) Is recovery upon breach of the condition of such a bond given by one holding such a permit limited to actual damages sustained by the United States?

VICTOR B. WOOLLEY,
J. WARREN DAVIS,
Circuit Judges.
ROBERT M. GIBSON,
District Judge.

[File indorsement omitted.]

7 In United States Circuit Court of Appeals

Clerk's certificate

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original certificate of questions to be submitted to the Supreme Court in the case of Ephraim Lederer, collector of internal revenue, plaintiff in error, vs. Mary A. McGarvey, executrix of the estate of Francis O'Kane, defendant in error, No. 3093, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 25th day of June, in the year of our Lord one thousand nine hundred and twenty-four and of the independence of the United States the one hundred and forty-eighth.

[SEAL.] SAUNDERS LEWIS, jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Indorsed on cover:) File No. 30461. U. S. Circuit Court of Appeals, Third Circuit. Term No. 120. Ephraim Lederer, formerly collector of internal revenue, vs. Mary A. McGarvey, executrix of the estate of Francis O'Kane. (Certificate.) Filed July 1st, 1924. File No. 30461.